Now, Mr. Berry asserts that his claim is liquidated. We don't believe it's liquidated. We believe it's subject to specific analysis by what the damages should be. The basis for his liquidation claim is that we somehow accepted his October 24th settlement offer by selling it to C&S. That's what he's alleging in his pleadings and I have an email from Mr. Hogan in here as well asserting that fact.

There are a couple problems with that argument. First of all, there's been no evidence asserted that anyone at Fleming ever called Mr. Berry and said, yeah, we accept your October 24th offer. No document says it. No witness from Fleming was asked that question. There's no evidence from which this Court could find that we accepted that offer explicitly.

I think Mr. Hogan's argument is that we accepted that offer implicitly by selling the software to C&S. Well, as I've already indicated, we certainly didn't intend to transfer the software to C&S. And to the extent that we did so, and it's not even clearly established that we did so, it was done inadvertently.

Even if he had wanted to accept that offer of $48 million, however, we can't by its own terms. The second sentence of the offer itself says, the following settlement offer will be held open until the conclusion of the settlement conference on November 4, 2002. I think the contention from Mr. Berry is that we accepted that offer by selling the assets to C&S. That asset

sale closed on August 23rd of 2003. That's some nine or ten months later. I think it's actually first year of Horn book law that you simply can't accept an offer after it's expired. This one has an expressed expiration term by its own terms. We couldn't have accepted it.

Now, to the extent the Court this is not a liquidated damage amount that's established somehow by this offer letter, I want to turn to the statutory and other damages that are available under the Copyright laws. Under the Copyright laws, Berry has a choice. He can get either the actual damages that he has suffered plus the profits derived from the infringement. Or he can get statutory damages.

With respect to his $48 million administrative claim, neither claim is large. The first one, which is the actuals plus the profits, if you actually look at his actual damages, the typical measure the courts use is the market value of the software. And we have evidence with respect to the market value of his 1993 freight control system and the evidence that we've got is that he sent it to Fleming, he gave a free license to Fleming and he never charged anything for it. He got no license fee whatsoever. And courts typically will look for what looked to equivalent license fees to try to determine the market value of a particular piece of software. There's no evidence to the contrary. The market value of this stuff is exactly zero.

If you look at what the profits were from the sale to

C&S of the software to the extent we get all the way down the chain to this point, those profits were zero. And the reason I say that is that the evidence that we saw from the stand that there was no intent to sell the software to C&S. So no part of the purchase price that C&S paid to Fleming for the entire complex of assets that was the wholesale division is fairly attributable to Mr. Berry's software. So in terms of the profits that would be derived from the alleged infringement, those are also zero.

Now, if you turn to statutory damages, there's certainly the case that under the Copyright laws there are statutory amounts that I think range from something around 1,000 up to $30,000 per infringement. But that depends upon the intent of the infringer. What Mr. Dillon testified to once again is that there was no intent to transfer the software. In fact, he tried to take it off of the servers in Kapolei before the transfer.

What the statutory damage provision say that if you can show that the infringer was not aware of the infringement when it took place, you get $200 in damages for infringement. Mr. Berry is articulated that, at least in his initial pleading, 16 files. 16 files times $200 is $3200. So we would submit that an absolute maximum for the statutory damages on the basis of the record that's in front of the Court is $3,200.

Now, that, of course, assumes that the 16 separate

copies that show up on the Guidance image are 16 separate works. The Copyright law defines a work in various ways. That there -- there's case law on this point as well, and we would contend that there is one work that may have been infringed 16 times. But the law says that the number of infringements doesn't matter. It's actually the number of works.

This has been litigated in a number of different factual settings. There was a piece of litigation in which one particular company basically copied CDs from 15 -- of 1500 different songs and the records not entirely clear, but it looks like 15 -- like a number of different recording artists. It wasn't specified in the record.

In that copyright infringement action, the specific number of infringements didn't matter. It was the specific number of works and the court said each separate song is a different work. We contend that for purposes of this litigation, Mr. Berry's freight control system is one single work.

Another case is a case involving copyrighting infringement of Mickey and Minnie Mouse. The plaintiffs had alleged that there six different infringements because there were six different incarnations of Mickey and Minnie Mouse that were infringed. The court said no, that's not six infringements. There are only two works, one of which is Minnie Mouse and one of which is Mickey, and you can only get damages on the basis of the number of works. One being Mickey, one being Minnie. So we

contend that the freight software that's allegedly been infringed here is a single work which would entitle Mr. Berry at a maximum to one statutory damage award, not multiplied by the number of infringements.

If, in fact, the Court believes that that that debtor's transferred to the extent it existed of the software to C&S was unintentional, that would be a grand total damage award of $200. One moment, please.

(Pause)

MR. LIEBELER: Two other minor points, Your Honor, and that is that by engaging MTI, we wanted to find out when the files were actually deleted. That was the point in engaging MTI. That was what Mr. Hogan prevented us from doing when he called them up and either warned them about a RICO action.

Last point on the liquidated damage amount in terms of whether or not we could have accepted Mr. Hogan's settlement offer, that would suppose that we had done a $48 million deal, we'd agreed to accept an offer for $48 million without Court approval. In fact, we never even knew about our acceptance of it when it occurred. The debtor can't do that. In order for the debtor to enter into a contract of any magnitude, we have to seek the Court's approval.

THE COURT: Post-petition.

MR. LIEBELER: That is post-petition. He claims that we accepted the contract when we sold to C&S. That we accepted

his pre-petition offer after the petition when we sold to C&S. We just think that can't be the case.

Your Honor, we contend that there's simply no sale under the Copyright laws. And we contend that if the Court does find a sale, there are no damages. We would contend that the Court should estimate this claim at a diminimus amount.

THE COURT: Thank you.

MR. SPRAYREGEN: Your Honor, before I address Mr. --

THE COURT: Well, why don't we hear the -- do the estimation first. I thought that was what the suggestion was. And then we can go to confirmation.

MR. SPRAYREGEN: Well, I can do it anyway. I thought we might hear the -- our entire argument over -- to overrule Mr. Berry's claim and then hear his response to both of that. But I'm happy to proceed either way. I will tell the Court the preview that we think once you go through all of the feasibility issues, it's not abundantly clear that it's actually necessary to estimate the claim in a particular number to get the feasibility. So that was one thing I was going to suggest. But I'm happy to proceed in any fashion the Court desires.

THE COURT: You want to respond to the estimation?

MR. HOGAN: I'd rather do the estimation, Your Honor, myself here.

MR. SPRAYREGEN: Then go.

THE COURT: Thank you.

MR. HOGAN'S CLOSING ARGUMENT

MR. HOGAN: Thank you, Your Honor. May it please the Court, Timothy Hogan on behalf of Wayne Berry. I'll try to follow with counsel's argument.

The question's whether -- and it just occurred to me Your Honor, counsel's end of his argument that Mr. Dillon testified to creating a piece of software, created during the administration of this case and that software had been transferred to C&S. I don't know of any document or order or anything that aloud that software to be transferred. And it just occurred to me that whatever it is that Mr. Dillon created, and it's our contention, Your Honor, it's simply Mr. Berry's software with a different name on it, whatever it was was created by the debtor, and given to C&S. There's no question that that happened. The question is how did they do that without some order of this Court. And I frankly don't know, Your Honor. I think it was just stated that couldn't be done.

Mr. Dillon testified to giving no original contribution to the work that went to C&S other than the data that went into it. I asked the question again, I was stopped as asked and answered, Your Honor, that's all he's done to create the replacement. I would offer Your Honor as a matter of law what he testified to is a very derivative that is alive and well and operating in Hawaii. Whatever the number you put on it, Your Honor, at least one thing I'd like to leave this courtroom is

with the idea that they created another derivative and sold it to C&S.

THE COURT: Well, it's not for me to determine. I'm just estimating your claim, if any, against the estate.

MR. HOGAN: And I agree with that, Your Honor. And I know you've passed on making that determination in favor of the Hawaii court doing so. But for the purposes of estimation, we come back to the idea of the indemnities. The indemnities that were, at least, brought up. I believe they've been submitted as Debtor's 179, I believe that's in evidence -- if someone wants to correct me, but I believe that is in evidence -- 179 is a copy of the indemnity letter that deals with Berry Technology going forward into the future indemnifying for the use of Berry Technology, the estate, presumably the reorganized debtors.

What would be the damages for that? Well, with all due respect, if counsel -- if Mr. Berry gets to determine whether or not he elects statutory damages.

THE COURT: Is that a claim you have against the estate? No, that's a claim that C&S may have against the estate, so --

MR. HOGAN: And I agree with that, Your Honor. And -- but part of what they were doing in this motion was to have you determine the outer most limits of Mr. Berry's claims against C&S.

THE COURT: No, I'm not deciding that.

MR. HOGAN: All right.

THE COURT: I'm deciding your claim against the estate.

MR. HOGAN: Then I'll move on, Your Honor. The issue with MTI, Your Honor. MTI was going in to make a copy of software. Noone asked us. We had non-destruction orders in Hawaii. There is a state law against non-destruction of evidence during civil proceedings. And I just leave that as it is, Your Honor.

THE COURT: Well, only address your claim against the debtor.

MR. HOGAN: Mr. Berry's declaration, Your Honor, exhibits -- it's Exhibit 310, 17 to 25, details the manner in which Mr. Berry arrives at what has been stated to be exorbitant numbers. It has to do with the single thing and if I may, Your Honor, one of their exhibits that went in, I think it's helpful to go back to it, it's Exhibit 303, Your Honor. And it -- Mr. Berry -- which I believe is in evidence, states as with any custom designed software system, this system is essentially worthless to anyone other than Fleming and API.

Now, that's a fairly strong thing when you're estimating a claim. But to the extent that they sold that one of a kind software to be able to close the deal with their purchaser, Your Honor, I think it deserves note.

THE COURT: What evidence do I have that they sold it?

MR. HOGAN: Mr. Dillon's testimony as to what he

actually put on their servers is a derivative of Wayne Berry's system. That -- the only thing that he added as original work was the data, that he essentially copied it and transferred it. That's undisputed in this record, Your Honor, that --

THE COURT: Well, it's not in the asset purchase agreement and nothing was paid for.

MR. HOGAN: And I don't dispute that although to the extent that it was -- you know, in terms of the large purchase price for the C&S acquisition, Your Honor, I don't know if I've ever seen a breakdown of how it went by asset. The $75 million that --

THE COURT: It's clear that the asset purchase agreement did not include Mr. Berry's software.

MR. HOGAN: And I don't dispute that it was not listed. I will say, Your Honor, if -- at this point, I have never seen Mr. Berry's software ever mentioned in the schedules or in any document that the debtor has ever created, although there is no doubt from the testimony that it has been operated during the pendency of this case, that it has been reversed engineered by Mr. Dillon --

THE COURT: That's a claim you may have against C&S and against the debtor for post-petition use, but tell me how I estimate the claim against the debtor only.

MR. HOGAN: Okay.

THE COURT: And it can't be based on a sale to C&S, on

the asset purchase agreement, or the price paid out of the asset purchase agreement because it's clear from those, is it not, that the software was not included.

MR. HOGAN: And I understand that that is true, Your Honor, but I'm saying that simply because someone did something they shouldn't do doesn't mean they didn't do it. And the idea that there is -- I believe the evidence is that there is a copy of Wayne Berry's software that was created by the debtors that is resident presently on C&S.

THE COURT: Then you may have a claim against C&S for infringement.

MR. HOGAN: Yes, Your Honor. I brought that claim.

THE COURT: But --

MR. HOGAN: As to Mr. Berry's administrative claim in this proceeding, his claim would be based on several ways of getting to it. One of them is usage. His lost profits, which is what counsel referred to, is a loss of licensing.

THE COURT: But for the debtor's usage, the license provided for no fee.

MR. HOGAN: No fee for the one that Mr. Berry wrote, not for the derivative they ran, Your Honor.

THE COURT: And for the derivative they ran, did not the jury place a value on that of 98,000?

MR. HOGAN: The jury placed -- the statutory damage maximum for willful infringement is $150,000 per work. I can

agree with counsel, per work. So when he --

(Loud speaker announcement)

THE COURT: All right. You may proceed.

MR. HOGAN: I'm sorry, Your Honor, I've lost my train of thought.

THE COURT: Damages for the debtor's use --

MR. HOGAN: The debtor used the software. Mr. Berry, if they had come to him for a license, would have asked them to pay what he charges other people to use it.

THE COURT: Well, what evidence do I have, in the record before me, that he got anything from anybody for this software?

MR. HOGAN: The declaration that is, I believe, paragraph 17-25, Your Honor.

THE COURT: Mr. Berry's declaration, Exhibit 310.

MR. HOGAN: That's correct, Your Honor.

THE COURT: Where's the evidence that he received anything?

MR. HOGAN: That he received anything.

THE COURT: For licensing software.

MR. HOGAN: No, Your Honor, I'm not going to misrepresent. When Mr. Berry licensed Fleming to use the software and we go to the exhibit so -- I'd like to just point it out, that Mr. Berry did grant Fleming a no-charge user license as a temporary measure. It's on the first page of 304, Your Honor.

It says Mr. Stuecy added it, I believe -- or whoever added it, it's in here, the long term goal of our operation is to interface with our company's --

THE COURT: Where are you reading?

MR. HOGAN: I apologize, Your Honor. Exhibit 304, second page, Bate stamp A004 --

THE COURT: I have it.

MR. HOGAN: -- 50. The long term goal is to -- the long term goal of our operation is to interface with our company's total inbound logistic system.

THE COURT: So?

MR. HOGAN: This was to be a temporary measure.

THE COURT: Where does it say that? And where after the debtor bought API did it change from being anything other than a zero license?

MR. HOGAN: Well --

THE COURT: In fact, there was an addendum, but that didn't change the price.

(Pause)

MR. HOGAN: Well, I -- according to the addendum, Your Honor, the idea of reverse engineering changing the software is what was prohibited in the license.

THE COURT: I understand.

MR. HOGAN: Yeah.

THE COURT: But you're going to -- you were going to

tell me what the value, or market value of the changed version would have been. But there's no evidence that any version was licensed by Mr. Berry for any money.

MR. HOGAN: Well, it is in the record, Your Honor, that there was a $2 million licensee/damage clause, last page of Exhibit 3004, this is the license that Fleming has offered.

THE COURT: Which exhibit? 304?

MR. HOGAN: 304, Your Honor, the last page, paragraph 10. That included a liquidating damage clause.

THE COURT: Well, it doesn't not say that that's the amount of damages. It simply says that the licensor will use that as a basis for calculating damages.

MR. HOGAN: That -- it says what it says, Your Honor. I -- if I misrepresented it, I apologize.

THE COURT: What other evidence is there of any value?

MR. HOGAN: Well, I guess -- how do you value, I guess, a piece of unique software.

(Loud speaker announcement)

THE COURT: I apologize.

(Pause)

THE COURT: I apologize, you may proceed.

(Pause)

THE COURT: All right. You may proceed.

MR. HOGAN: Thank you, Your Honor. I guess, Your Honor, we're talking about what Mr. Berry's claim would be

against the estate for the manner in which his software was handled during the administration of the estate if we're dealing with an administrative claim. I believe that to be the outer limits of what Mr. Berry could claim.

And I would say, Your Honor, by transferring a copy, although that may be a separate issue, by giving it to the one entity, which in 303 it's -- he -- Mr. Berry admits that it's -- really only one person can use this, it's custom made. It would be like taking the software out of one of these buildings and carrying it to another building, it may not operate the elevators. But whoever built that building, it has an intrinsic value.

How do we arrive at that, Your Honor? Do we need to arrive at that at this point in this proceeding in order to get the confirmation? That I don't know. I --

THE COURT: Well, I think the answer is yes. We have to put some estimate on your claim if you're using your claim as a means to prove that the plan is not feasible because the administrative claims can't be paid.

MR. HOGAN: My -- if I may, Your Honor, my argument on confirmation was primarily that I was objecting to the fact that the plan was being used as a sort of a facto compli to transfer my client's software to C&S, that it was under the idea that a plan must be done through a lawful means argument. The estimation is still there, Your Honor. The fact that it is a

large claim that has to be dealt with. When taken in light of the indemnities that are out there, Mr. Berry's claim is potentially a serious claim for the estate because as the Court has indicated, C&S's liabilities are going to go forward, then it is -- we have the people from Fleming, the CFO --

THE COURT: But to prove your case you have to give me more than just argument.

MR. HOGAN: I understand that.

THE COURT: It's a serious claim. Give me a number. If it's $100,000, they're feasible even if you win.

MR. HOGAN: That is correct. But what I'm saying, Your Honor, is his claim --

THE COURT: If it's $2 million, they're feasible even if you're correct.

MR. HOGAN: Then I would stand with this claim, Your Honor. It's $48 million if they want to sell it to C&S.

THE COURT: How? How can I determine or estimate your claim at that? That's what you were willing to settle? They said no, that's not their value apparently because they --

MR. HOGAN: But then they shouldn't --

THE COURT: -- did not accept it.

MR. HOGAN: I apologize. They shouldn't have transferred it, Your Honor. They should have -- when the case --

THE COURT: Well, whether or not they did or not, let me assume they did everything wrong. How do I calculate that

amount? They might have transferred it to C&S and yet they think it's not worth $48 million, so they didn't settle with you thinking you'll get $200,000 if you win. You've got to -- I need evidence to estimate your claim to determine whether or not you're an impediment to confirmation.

THE COURT: Well, I would refer the Court to Mr. Berry's declaration in which he details the manner in which this software was employed to make money for Fleming, API and presumably now C&S.

THE COURT: How does that translate into a damages award?

MR. HOGAN: Because it would determine what an arms-length licensing fee would be were they to come to Mr. Berry --

THE COURT: How? How can I come to an arms-length licensing fee? The only licensing fee that I know of was zero to the debtor to whom it was the most valuable according to Mr. Berry's statement. I mean if it's zero for one person that can really use it, how can I calculate it's value as anything other than zero?

MR. HOGAN: Well, I guess the easy way would be why didn't -- I think the Court can infer from what's happened in this case that it would have been a lot easier if it was worthless software to simply walk away from it and end it and be done with Mr. Berry.

THE COURT: They -- well, the evidence was they tried.

MR. HOGAN: And I -- and -- well, the evidence was they tried by creating a derivative.

THE COURT: And you may be correct. And I'm assuming you're correct for purposes of today.

MR. HOGAN: Basically, Mr. Berry has cited what Fleming charges logistics fees for K-Mart in here from the K-Mart contracts. K-Mart is the only -- the only place that K-Mart still does business with Fleming and now C&S that I know of is in Hawaii.

THE COURT: But that was the --

MR. LIEBELER: Your Honor, I object. That's not on the basis of evidence --

THE COURT: Please. That's what the debtor got as a result of it. It's not what Mr. Berry was entitled to. Regardless of how the debtor used it in its business and how the debtor generated revenues perhaps is a result of it. It's not what Mr. Berry was entitled to. Mr. Berry was entitled to no license fee.

MR. HOGAN: And up to a point, Your Honor, I would concede. Had the debtor gone into bankruptcy without any infringement, nothing happening, and used the software up until the point that they're ready to emerge from bankruptcy or sell their software, I would concede to this Court Mr. Berry isn't owed a dime. I'll concede that point.

But we're not talking about that. What we're talking

about is when the debtor doesn't operate the system the same way, doesn't say, okay, it's at the end of the day, here's your software back, Mr. Developer, thank you very much. But where the debtor uses a very concerted action to transfer it to a third-party. The only third-party, Your Honor, by the evidence who could buy it. Essentially wiping out his market. And I can see the Court's problem, what was that market worth.

THE COURT: Exactly.

MR. HOGAN: And from the Copyright Act, Your Honor, allows damages for loss -- for actual damages which I take to mean lost license revenues.

THE COURT: You were getting zero for the license fee.

MR. HOGAN: Exactly.

THE COURT: So that's zero.

MR. HOGAN: Exactly.

THE COURT: All right.

MR. HOGAN: And then the profits of the infringer. I asked a question, does anybody know how much C&S makes in a profit on the Hawaii division? Does anybody know what the Hawaii division makes?

THE COURT: Well, it's not clear to me that the Copyright Act would give you all of their profits.

MR. HOGAN: And it is -- and I don't -- I'm not saying it would be. But it would be the profits derived from the infringement, Your Honor.

THE COURT: Right.

MR. HOGAN: And see --

THE COURT: So how am I to calculate that?

MR. HOGAN: And that is what is in Mr. Berry's declaration, Your Honor. And it is a way to calculate how much the system makes. And moreover, Your Honor, how much it will lose if it is taken away.

THE COURT: Well, even accepting Mr. Berry's testimony, can I conclude that the revenues that the debtor received for its shipping are related solely to your software? I don't think I can conclude that.

MR. HOGAN: I would say, Your Honor, that based on Mr. Ron Griffin's, that's Berry 1, it's Mr. Berry's Exhibit 1, his admission that there was no replacement software at all. And that they had -- his advice was is to pay a licensing fee indicates --

THE COURT: Well, that was one option.

MR. HOGAN: That was his conclusion, Your Honor, I believe.

THE COURT: Define some of --

MR. HOGAN: That however distasteful, I think he said --

THE COURT: Define some accommodation. It doesn't say pay the licensing fee.

MR. HOGAN: It's pay a licensing fee. What I'm saying

is, Your Honor, there wasn't a replacement. It was one of a kind. What does something that is unique worth in the world? How do you pick a value for it?

Under the Copyright Act, you would say, well, what did it make you but for that piece of software. I think that's --

THE COURT: I think there's no evidence that they could not have operated without this software. What evidence of that is there?

MR. HOGAN: No, and I agree, Your Honor. I'm not going to say they couldn't -- they could stop operating tomorrow without it.

THE COURT: No, they could operate without the software.

MR. HOGAN: That's --

THE COURT: Perhaps they won't be able to print a report, but they can operate without the software.

MR. HOGAN: I think -- well, they could operate, Your Honor.

THE COURT: They operated before they had the software.

MR. HOGAN: That's correct. And the food got to Hawaii. And it didn't come in through Fleming is all. And that, I believe, is what Mr. Berry's declaration deals with is that it was -- allowed Fleming to be a freight consolidator. And to the extent that it --

THE COURT: It's not the only thing that allows Fleming

to be a freight consolidator. There's a lot more than just Mr. Berry's software involved in being a freight consolidator. There are employees. There're stevedores that you deal with.

MR. HOGAN: That's -- that is true.

THE COURT: There's shippers you deal with. There's a lot involved in the business. I can't simply conclude that all the revenues received by Fleming or by C&S at this Hawaii location would be the measure of damages for wrongful infringement. Based on the evidence I have. Even assuming Mr. Berry's declaration is accurate.

MR. HOGAN: Basically, Your Honor, what Mr. Berry's declaration, if there's one thing that his system does is it will reach a savings through the use of the software. A -- an efficiency of $1763 a container. The --

THE COURT: Well, that's not what he's --

MR. HOGAN: Paragraph 18.

THE COURT: Well, there's no -- nothing in this that tells me how much -- how many containers they did, in fact, handle. There's no basis for his statement that he believes they could have handled no more than 20 containers a week.

MR. HOGAN: Your Honor, there -- it actually does parse the gross sales tax receipts on page -- on paragraph 21 to arrive at a container number. Based on the Hawaii gross -- we have a gross sales tax that he reversed out and arrived at a number of containers per year which would be 35,871 containers a year.

THE COURT: But tell me the basis in paragraph 18 for his belief that API would have been limited to 20 containers per week without his software.

MR. HOGAN: Yeah, it's in the other part of his declaration, Your Honor, in the story of API. And I don't want to go into it because it's not in the record. But it's -- Mr. Berry, I think it was testified, was the president of API, came in and helped run the company. And his -- it isn't -- it's knowledge of the person who would know these facts. That -- the intrinsic value of selling a unique piece of software to someone is going to be difficult for anyone to establish, Your Honor.

THE COURT: Yeah, but isn't the best evidence what you were actually getting from Fleming? Which was zero.

MR. HOGAN: Well, no, I don't think that -- Your Honor, I understand that Mr. Berry allowed Fleming to use his software and I believe Mr. Stuecy's statements in that memorandum as an interim measure. And as we had Mr. Dillon discussing, one of the reasons Mr. Berry did that is so he could employ his former employees as the company was being put out of business.

Now, it may not seem like a good business deal for most people, but I don't think it should be construed as him waiving his rights as a copyright owner. To protect --

THE COURT: I'm not suggesting his waiving his rights, but he's suggesting he's put a value on those rights. And there's nothing in the exhibits to suggest it was a temporary

measure only.

MR. HOGAN: Only the exhibit that I referred to, Your Honor, the EULA, the first page of the EULA that was the memorandum.

THE COURT: Yeah, but even your statement, the long term goal of our operation is to interface with our company's total inbound logistics system. What does that mean?

MR. HOGAN: It's, I believe, to get rid of Mr. Berry. That's what I believe it meant. Which is -- he's almost gone, Your Honor, so --

(Laughter)

MR. HOGAN: But now he's C&S's problem.

(Laughter)

THE COURT: Yes, he will.

MR. HOGAN: Let's say I have nothing else, Your Honor.

THE COURT: All right. What other evidence?

MR. HOGAN: I think that's it, Your Honor.

THE COURT: All right.

MR. LIEBELER: Nothing further on estimation, Your Honor. I would yield to Mr. Sprayregen with respect to the overall confirmation issues.

THE COURT: All right. Well, let me make a ruling on the estimation so we can proceed more orderly. I think that -- and again, for purposes of this proceeding, I must assume there is some claim that Mr. Berry has against the debtor that would

qualify as an administrative expense. And I'm prepared to estimate the administrative expense at $100,000.

The only evidence really before me that it has any value, the license agreement provides that the debtor may use it for no licensing fee. So that is not evidence of any value for the debtor's use that would constitute the administrative expense. There is the jury verdict that found that the debtor had made improper changes to and was using the changed version which constituted infringement and the jury awarded damages of approximately $98,000. So that is some evidence of a value that can be attributed to any claim for infringement. That is, change of the original version of the software.

With respect to any alleged damages for a sale to C&S, there is no evidence of a sale to C&S. The asset purchase agreement specifically does not include the software. My ruling at the hearing on approval of the asset purchase agreement made it clear that there was no sale of Mr. Berry's software. So nothing can be attributed to any value the debtor received as a result of any sale of the software. So I would estimate the Berry administrative claim against the debtor at $100,000.

MR. SPRAYREGEN: Thank you, Your Honor. With respect to confirmation, and obviously in my confirmation argument, I'll take this ruling in account with respect to the feasibility objection, I think in the first instance there was one party that I had reported was resolved, Mr. Block. And they stepped up and

it was a little bit unclear whether there was still a confirmation objection or whether he was just agreeing that it was close to being resolved but it wasn't resolved yet. I can report and I believe Mr. Block's counsel is still in the courtroom, that that is now settled and the documentation is in process and the settlement of that claim we would intend to submit under a certification of counsel to the extent the court order will confirm the plan.

MR. HOUSTON: Good afternoon, Your Honor. Joseph Houston of Stevens Lee and Dunn. That is correct. We have reached an agreement. It's simply a matter now of actually signing an agreement and on that basis we withdraw the objection.

THE COURT: All right. Thank you.

MR. HOUSTON: Thank you.

MR. SPRAYREGEN'S CLOSING ARGUMENT

MR. SPRAYREGEN: So, Your Honor, we're back to where I thought we started which is with the one objection. And the basis of the objection is both feasibility and lack of good faith that we proposed a plan by means of forbidden by law. I would in the first instance state that we believe all of the other evidence we've put in satisfies all of the other confirmation standards and I'm happy to go through those because it is our burden, but I think they're well in the evidence unless the Court desires them.

THE COURT: That's fine. I think it's stated in the

evidence that is presented and the memorandum of all submitted.

MR. SPRAYREGEN: Your Honor, there's obviously the allegation that we have not proceeded in good faith, but that we're proceeding by means forbidden by law. I think that's second part is basically addressed by the Court's ruling that the software was not transferred and couldn't have been transferred because of your order at the sale.

THE COURT: I didn't say it wasn't transferred. I said it wasn't sold.

MR. SPRAYREGEN: I'm sorry, wasn't sold. And that being the case, the basis for the lack of good faith objection is that we did sell it and, in fact, sold it inconsistent with your order at the sale hearing. Your Honor, even with those allegations, I think that we don't look at the good faith issue solely with respect to one objection. We look at the proposed plan and is it overall proposed in good faith and not by any means forbidden by law. I'm not -- I don't see any means forbidden by law allegation any longer with respect because of the no transfer -- excuse me, no sale ruling.

And with respect to the balance of the good faith issue, that's always a strange confirmation standard to try to prove in that insomuch you're trying to prove a negative. But Mr. Stenger did testify as to the debtor's good faith in the proposal of the plan. And I think the most persuasive evidence of the debtor's good faith is the support, overwhelming support

for the plan through the votes in support of the plan by every class and by the support of the plan by the two official committees, by the Exit financing lenders support of the plan.

And I don't think I would add anything more generally with respect to good faith. With respect to Mr. Berry's specific allegations, I think the testimony of Mr. Dillon is directly to the contrary that if anything was transferred, even if it wasn't sold, it, one, wasn't used, and two, it was inadvertent. And that there were strenuous efforts by the debtor and that was -- came in through multiple parts of the evidence to eliminate any issue with respect to Mr. Berry whether that was successful or not can be decided another day in another court.

THE COURT: What about the allegation that the -- that debtor has agreed to indemnify C&S for this issue contrary to the asset purchase agreement? Is it contrary?

MR. SPRAYREGEN: No, it isn't, Your Honor. The -- again, the asset purchase agreement is approved by a court order, the sale order. The sale order authorizes the debtor to enter into the asset purchase agreement, and in essence, not quote such other agreements consistent with the closing, I think the word's supplemental agreements consistent with the asset purchase agreement.

THE COURT: How is that consistent with the asset purchase agreement?

MR. SPRAYREGEN: We have indemnity provisions in the

asset purchase agreement already. Your Honor, my understanding of what happened, and I wasn't there, is between the time the asset purchase agreement was approved and the time of closing, Mr. Berry sued C&S, this was prior to closing. So not surprisingly, C&S sought some confirmation that the indemnification obligations in the asset purchase agreement would be picked up in some way given that, in essence, a allegedly potentially indemnifiable claim has actually arisen before we even closed.

THE COURT: Well, is it indemnifiable under the asset purchase agreement? Run me through the asset purchase agreement.

MR. SPRAYREGEN: Well, first of all, I'm going to ask Mr. Liebeler to get up and address that. But I think more importantly, the issue of whether it is I think will be ultimately an issue for another day. What we have done thus far because of what joint counsel in Hawaii is, we have covered the attorneys' fees, we'd have to bear that expense. In any event --

THE COURT: Why?

MR. SPRAYREGEN: Because we've been sued also.

THE COURT: You've -- but you would have to cover C&S's attorney expenses?

MR. SPRAYREGEN: No, we have the same counsel. They're going to have counsel, too, but we have our own counsel and they're using them also. So, it's not as if it's an additional expense. But it's not unusual in a situation where you have an

allegation of an indemnifiable liability and there may or may not ultimately be a dispute as to whether it is indemnifiable for the parties to proceed with -- on an interim basis with covering attorneys' fees in the hopes that ultimately the claim goes away and we don't have to get into a larger fight over a $48 million issue as distinct from a $100,000 issue which would be a much different type of thing to resolve and we never really have to get in a large dispute.

But no, we don't think there's anything inconsistent about the indemnity agreement from the indemnities approved in the asset purchase agreement.

THE COURT: Well, let me hear why.

MR. LIEBELER: Your Honor, the reason that there's no inconsistency between the indemnity agreement which we have actually, I think, is 211 in the binder, is because the indemnity agreement, which we've called the side letter, itself refers back to Section 13.3G and is qualified by Section 13.3G of the asset purchase agreement.

THE COURT: Tell me the exhibit, No. 178, is it?

MR. LIEBELER: Actually, I've got it in two places, Your Honor. The easiest one I've got it in the Berry binder as 312.

THE COURT: Yes.

MR. LIEBELER: And the side letter is 311, Your Honor.

THE COURT: Show me where on 312 is the